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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In Re TRANSPACIFIC PASSENGER AIR TRANSPORTATION ANTITRUST LITIGATION This Document Relates to: All Actions	Civil Case No. 3:07-cv-05634-CRB MDL No. 1913 **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED CLASS ACTION COMPLAINT RE ISSUES COMMON TO ALL NIPPON AIRWAYS CO., LTD., CHINA AIRLINES, LTD., AND THAI AIRWAYS INTERNATIONAL PUBLIC COMPANY LIMITED** Date: March 12, 2010 Time: 10:00 a.m. Ctrm: 8, 19th Floor Judge: The Honorable Charles R. Breyer

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I. STATEMENT OF ISSUES TO BE DECIDED

(1) Whether the state action doctrine implicitly precludes U.S. enforcement of its antitrust laws affecting U.S. commerce.

(2) Whether this court should hold that a wholly foreign regulatory scheme impliedly preempt the Sherman Act pursuant to *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007) ("*Credit Suisse*").

II. INTRODUCTION

Defendants All Nippon Airways Co., Ltd. ("ANA"), China Airlines, Ltd. and Thai Airways International Public Company Limited's (collectively, "Defendants") argument that the state action doctrine immunizes them from antitrust liability in this case fails because: (1) the state action doctrine does not apply to private parties' conduct authorized and supervised by a foreign government; and (2) even if the Court were inclined to extend the doctrine to such conduct, Defendants' conduct does not satisfy the elements of the test as set forth by the United States Supreme Court.

Defendants' additional argument that Plaintiffs' claims are barred because the Japanese regulatory regime impliedly preempts the Sherman Act also fails because: (1) implied preemption is a disfavored principle, and has been held by some courts to be applicable only in the securities context; and (2) to the extent implied preemption is applicable outside the securities context, it does not apply here because there is no "clear repugnancy" between the regulatory regime in question and the antitrust complaint.

III. ARGUMENT

A. The State Action Doctrine Does Not Immunize Defendants From Plaintiffs' Sherman Act Claims

Defendants' argument that the Court should extend the state action doctrine to immunize them from antitrust liability fails because: (1) no U.S. court has ever extended the doctrine to apply to foreign companies' conduct authorized and supervised by a foreign government; (2) the doctrine is based on principles of federalism that do not support its extension to such conduct; and (3) even if the doctrine does apply to conduct authorized and supervised by a foreign government,

the doctrine does not immunize Defendants' conduct because Defendants have not shown that the Japanese government actively supervises their conduct.

The state action doctrine protects most state laws and actions from scrutiny under the Sherman Act. *Sanders v. Brown*, 504 F.3d 903, 915 (9th Cir. 2007) ("*Sanders*"). The doctrine originated in *Parker v. Brown*, 317 U.S. 341, 350-52 (1943) ("*Parker*") (and is, therefore, also known as "*Parker* immunity"). In *Parker*, the U.S. Supreme Court dismissed a Sherman Act challenge to a California law that restricted competition among raisin manufacturers, holding that nothing in the Sherman Act suggested that its purpose was to restrain a U.S. state or its officers or agents from activities directed by its legislature. *Sanders*, 504 F.3d at 915, *citing Parker*, 317 U.S. at 350-51.

The test for whether the state action doctrine applies in a particular case depends on the nature of the defendant. Whereas the doctrine immunized a U.S. state legislature from Sherman Act liability in *Parker*, the doctrine immunizes a private party only if both: (1) the private party is acting pursuant to a U.S. state's policy that the state articulated clearly and affirmatively to allow the allegedly anticompetitive conduct; and (2) the state provides active supervision of the allegedly anticompetitive conduct by the private actor. *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("*Midcal*"). *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985) ("*Southern Motor Carriers*") ("we hold *Midcal's* two-pronged test applicable to private parties' claims of state action immunity"); *Sanders*, 504 F.3d at 915-16 (this "two-part '*Midcal* test' is only needed to decide whether private conduct pursuant to a state statute gets *Parker* immunity"). In *Midcal*, a California statute authorized private wine producers to set and file prices, and California enforced the prices thus established. 445 U.S. at 99, 105. The United States Supreme Court held that the system satisfied the first part of the *Midcal* test but not the second because "[t]he State neither establishes prices nor reviews the reasonableness of the price schedules[.]" *Id.*

"The second prong of the *Midcal* test requires that the state 'exercise ultimate control over the challenged [private] anticompetitive conduct.'" *Snake River Valley Elec. Ass'n v. PacifiCorp*,

238 F.3d 1193 (9th Cir. 2001) *quoting F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992) ("*Ticor*"). "'The [active supervision] requirement is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the [U.S.] State, actually further state regulatory policies.'" *Id.* at 634 *quoting* *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988). "Its purpose is to determine whether the [U.S.] State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." 504 U.S. at 634-35.

1. No U.S. Court Has Ever Extended the State Action Doctrine to Conduct Authorized and Supervised By a Foreign Government

Defendants do not and cannot cite a single case applying the state action doctrine to immunize price-fixing by a private entity purportedly acting according to *foreign* government policy. Defendants, however, claim,

> Sovereign governments, such as Japan's, must be accorded at least the same respect for their treaties and regimes that U.S. courts give to the regulatory regimes of the 50 U.S. states as they regulate their intrastate commerce, even where interstate commerce is affected.

Japan Regulatory Brief[1], p. 10.

The relevant authority, however, is to the contrary. *Cf. Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 397 (D. Del. 1979) ("[d]efendant's motion to dismiss on grounds of state action finds no support in an antitrust law that expressly covers corporations organized under the laws of foreign states. To accept defendant's position would involve redefining 'person' or 'persons' under the antitrust laws to include 'corporations and associations existing under or authorized by . . . the laws of any foreign country except those countries which control their economies.' The Court declines to rewrite the statute. Defendants' motion to dismiss on a theory of state action is denied") (footnotes omitted).

[1] Defendants designate the joint motion to dismiss filed by ANA, China Airlines and Thai Airways the "Japan Regulatory Brief". For the Court's convenience, Plaintiffs use the same designation herein.

2. The Rationale Underlying the State Action Doctrine Does Not Support Its Extension to Conduct Authorized and Supervised By A Foreign Government

The state action doctrine is based on principles of federalism. "The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *Southern Motor Carriers*, 471 U.S. at 61. "[I]n *Parker v. Brown*, . . . [o]ur decision was grounded in principles of federalism." *Ticor*, 504 U.S. at 633.

In *Parker*, California's law restricting competition "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." 317 U.S. at 350. "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351.

"The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine in our decisions [including] *Midcal*[.]" *Ticor*, 504 U.S. at 633. "Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." *Id.*

Accordingly, the Court should reject Defendants' attempt to immunize their illegal conduct and should not extend the state action doctrine to price-fixing by private entities purportedly acting pursuant to *foreign* government policy because the state action doctrine is based on principles of federalism. As the U.S. Supreme Court explained in *Parker*, the U.S. has a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority. 317 U.S. at 351. Accordingly, the states *retain* the powers that they originally had unless such powers are taken from them,

pursuant to the Constitution. In *Parker*, the Court held that in enacting the Sherman Act, Congress had not taken from the states the "ability to regulate their domestic commerce." *Southern Motor Carriers*, 471 U.S. at 56. Foreign governments are not subject to the protection accorded to states in the U.S. under the Tenth Amendment, and do not have any powers that, under the Constitution, the U.S. government could either take from them or allow them to *retain*. Thus, Defendants' argument that state action immunity should be *extended* to private parties' actions allegedly sanctioned by a foreign government must fail.

3. The U.S.-Japan Air Services Agreement Is Not Dispositive of the Present Claims

Defendants' reliance on air services agreements between the U.S. and foreign governments is also misplaced. The very documents proffered by Defendants to support their claim that the Japanese government policy displaces competition, and thus provides Defendants with immunity under the state action doctrine, expressly provide that they do not insulate Japanese airlines from U.S. antitrust scrutiny. The "Memorandum of Understanding" Between the United States and Japan (March 14, 1998) provides:

> *Nothing in this 1998 MOU shall be construed to limit the rights of either Party to enforce its domestic competition laws* and other laws and regulations on such issues as safety, security and environment against any airline operating services under this 1998 MOU or any of the prior agreements following an appropriate proceeding, so long as such laws and regulations do not discriminate on the basis of nationality or any other improper or inappropriate basis.

(Exh. 5 to ANA's, China Airlines' and Thai Airways' Request for Judicial Notice, at p. 26, ¶ X.C.2, emphasis added). In *Laker Airways Limited v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) ("*Laker Airways*"), the court of appeal held that foreign air carriers are subject to U.S. antitrust laws and are not immunized from liability simply by virtue of their governments' entry into air transportation agreements like those here. The court held:

> The landing rights granted to [KLM and Sabena] are permits to do business in this country. Foreign airlines fly in the United States on the prerequisite of obeying United States law. They have offices and employees within the United States, and conduct substantial operations here. By engaging in this commercial business they subject themselves to the in personam jurisdiction of the host country's courts.

> They waive either expressly or implicitly other objections that might otherwise be raised in defense.

Id. at 924-25, 932 ("KLM and Sabena have no claim to antitrust immunity under their air service treaties"); *see also Airline Pilots' Association, International v. TACA International Airlines*, 748 F.2d 965, 969 (5th Cir. 1984) ("[t]he express language of the Air Transportation Agreement reflects that the parties did not intend the agreement to replace relevant domestic labor law.").

In fact, Congress has specifically enacted legislation concerning the antitrust obligations of foreign air carriers that want to gain access to the U.S. market. 49 U.S.C. § 41301 *et seq.* establishes the framework in which foreign air carriers are able to obtain permits to operate in the United States. Within this overarching regulatory framework, 49 U.S.C. § 41308 provides a limited antitrust exemption for foreign air carriers "[w]hen the Secretary of Transportation determines that it is in the public interest . . . ."

The Defendants are well aware that the U.S. Department of Transportation ("DOT") rarely grants antitrust immunity:

> Board decisions have emphasized that a grant of immunity is extraordinary relief, appropriate only upon a strong showing by the proponents that it is necessary to permit the transaction to proceed or that it is required in the public interest. *Antitrust exposure is a normal risk of doing business in an unregulated competitive environment and is consistent with our policy of reliance on competition to the maximum extent possible.*

Braniff South American Route-Transfer Case, 1983 C.A.B. LEXIS 288 at *28-29 (C.A.B.) (emphases added); *see also* S. Rep. 96-329, 1979 WL 10388, *7 (Leg. history for Air Transportation Competition Act of 1979) ("The antitrust laws remain fully applicable to . . . foreign air transportation").

Similarly, the U.S. Department of Justice ("DOJ") does not recognize the existence of air transport agreements as a limitation on its ability to prosecute violations of the antitrust laws. *See* http://www.justice.gov/opa/pr/2009/April/09-at-324.html, RJN (P) (referencing guilty pleas of 15 foreign air carriers in the related air cargo/air passenger price-fixing investigation); CAC ¶ 293. Nor has the existence of air transport agreements affected the pleading motions in *In re Air Cargo*

Shipping Services Antitrust Litigation, 2009 U.S. Dist. LEXIS 97365 (E.D.N.Y. Aug. 21, 2009), *aff'g* in part, 2008 U.S. Dist. LEXIS 107882 (E.D.N.Y. Sept. 26, 2008). In light of this strong, consistent authority against immunizing foreign air carriers from antitrust immunity, Defendants' argument that this Court should extend the state action doctrine to conduct of private parties authorized and supervised by foreign countries cannot stand.

4. In the Absence of Qualified State Action, Defendants' Immunity Claim Fails

Because the state action doctrine does not apply to foreign governments, Defendants' claim of immunity fails and can only be seen as an attempt to "cast[] a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106. "As *Parker* teaches, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . .'" *Id.; see also Parker*, 314 U.S. at 351. "Th[e] supervision requirement [of the *Midcal* test] prevents the State from frustrating the [U.S.] national policy in favor of competition . . . ." *Southern Motor Carriers*, 471 U.S. at 57.

In fact, in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) ("*Hartford*"), an antitrust case that is closer factually to this case than any case that Defendants cite because it involved foreign private party defendants who claimed their actions were consistent with *foreign* law, the Supreme Court held that "[t]he fact that conduct is lawful in the [foreign] state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct." *Id* at 799. Defendants argue that *Hartford* is distinguishable because: (1) it turned on whether there was a *conflict* between U.S. law and that of a foreign sovereign rather than, as here, a purported *tension* between regulatory expectations; and (2) the *Hartford* defendants did not plead state action immunity. Japan Regulatory Brief, p. 15.

In *Hartford*, plaintiffs, including nineteen U.S. states and many private plaintiffs, alleged that defendants, including British reinsurers and brokers, conspired to only offer certain coverage

in the U.S. and to withhold other types of coverage. *Hartford*, 509 U.S. at 770, 776-77. These foreign defendants did not invoke the state action doctrine but instead argued that the court should refrain from exercising its jurisdiction on the grounds of international comity. *Id.* at 797. The U.S. Supreme Court ruled that comity could not defeat jurisdiction unless there was a true conflict between domestic and foreign law. *Id.* at 798. The court held that no conflict exists where a person subject to regulation by two countries could comply with the laws of both. *Id.* at 799. The foreign defendants in *Hartford* did not argue that British law required them to act in some fashion prohibited by the law of the U.S. or that compliance with the laws of both countries was otherwise impossible. *Id.* The court concluded that there was no conflict with British law. *Id.*

Here, Defendants also admit that there is no conflict between U.S. and Japanese law. Japan Regulatory Brief, p. 15. Instead, they claim that there is merely a tension between regulatory expectations. *Id.* Rather than extending the state action doctrine to private parties who claim they were acting in accordance with foreign government policy, which has never been done before, the Court should follow *Hartford* and deny Defendants' motion to dismiss based on their admission that there is no conflict between U.S. and Japanese law and that Defendants could therefore have complied with both.

5. Even If the State Action Doctrine Is Applied to Conduct Authorized and Supervised By a Foreign Government, It Does Not Immunize Defendants' Conduct

Finally, even if the Court were inclined to extend the state action doctrine to private parties purportedly acting pursuant to foreign government policy, Defendants do not meet the second part of the *Midcal* two-part test, which requires that the relevant government actively supervise the allegedly anticompetitive conduct by the private actor. *Midcal*, 445 U.S. at 105. In *Midcal*, a California statute authorized private wine producers to set and file prices. *Id.* The United States Supreme Court held that while this satisfied the first part of the *Midcal* test, the second part was not satisfied because "[t]he State neither establishes prices nor reviews the reasonableness of the price schedules[.]" *Id.*

The DOT has held that "tariff filings, particularly ex-Japan, are often meaningless because of heavy discounting and other features of the distribution system in Japan[.]" *U.S.-Japan Service Case*, 1990 DOT Av. LEXIS 90 (D.O.T. 1990) at *159. The DOT held that "fares posted by the [Japanese] airlines are rarely the selling fares in the market" and that the practice is to have "high posted prices and unposted selling fares." *Id.* at *28-29.

Thus, the DOT has determined that the Japanese government does not actively supervise the actual discounted prices that Japanese carriers charge, which constitute the majority of the prices charged and which are different from the tariffs filed with the Japanese government. Accordingly, because of the DOT's determination, as in *Midcal*, Defendants' conduct does not satisfy the second part of the *Midcal* test, and, even if the Court is inclined to extend the state action doctrine to conduct by foreign private parties that is authorized and supervised by a foreign government, the doctrine does not immunize Defendants' conduct.

B. The Japanese Regulatory Regime Does Not Impliedly Preempt the Sherman Act

Defendants argue that Japan's air services agreements with the United States and other governments, and that country's aeronautic regulatory regime, implicitly preclude application of the U.S. antitrust laws in this case, based on *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007) ("*Credit Suisse*").

In *Credit Suisse*, a group of investors filed two antitrust class-action lawsuits against several investment banks that "had acted as underwriters, forming syndicates that helped execute the IPOs [initial public offerings] of several hundred technology-related companies." *Credit Suisse*, 551 U.S. at 267. The investors alleged that the underwriters (banks) had violated the antitrust laws by conspiring to sell shares only to buyers who agreed to pay excessively high sales commissions, to purchase other less desirable securities ("tying"), and to buy additional shares at escalating prices ("laddering"). *Id.* An extensive scheme of securities regulations governed the IPO underwriting practices at issue. *See id.* at 277 ("[t]he law grants the SEC authority to

supervise all of the activities here in question"). "Indeed," the Court noted, "the SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage." *Id.* In particular, the SEC prosecuted tying and laddering arrangements as "fraudulent and manipulative" practices prohibited by section 17(a) of the Securities Act of 1933 and section 10(b) of the Securities Act of 1934 and SEC Rule 10b-5. *Id.* In stark contrast to the present case in which the misconduct alleged is unlawful, the cooperation and communication among underwriters at issue in *Credit Suisse* was necessary to the IPO market and was not only encouraged but *required* by the securities laws.

The Supreme Court framed the issue presented in *Credit Suisse* as whether "there was a 'plain repugnancy' between the[] antitrust claims [alleged] and the federal securities law." *Credit Suisse*, 551 U.S. at 272; *quoting Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682 (1975). The Court began its analysis by restating principles from earlier decisions that specifically address implied repeal in the securities context. First, the Court noted that, where possible, courts should "reconcil[e] the operation of both [i.e., antitrust and securities] statutory schemes . . . rather than holding one completely ousted." *Id. quoting Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). Second, the Court emphasized that "[r]epeal of the antitrust laws is to be implied only as necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Id. quoting Silver*, 373 U.S. at 357. Third, the Court held, preclusion of antitrust laws is to be found only where, "given context and likely consequences, there is a 'clear repugnancy' between the securities law and the antitrust complaint – or as we shall subsequently describe the matter, whether the two are 'clearly incompatible.'" *Id,* at 275; *quoting Gordon*, 422 U.S. at 682.

To determine clear incompatibility, the Court identified four factors it deemed critical for repeal of the antitrust laws. These are: (1) "the possible conflict affected practices that lie squarely within an area of financial market activity that the [regulatory] laws seek to regulate"; (2) "the existence of regulatory authority under the [relevant] laws to supervise the activities in

question"; (3) "evidence that the responsible regulatory entities exercise that authority"; and (4) "a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct." *Credit Suisse*, 551 U.S. at 264.

Defendants fail with respect to each factor to demonstrate clear incompatibility between Japan's laws and regulatory regime, and the United States' antitrust laws.

1. The Complaint Does Not Allege Misconduct That "Lies Squarely Within An Area of Financial Market Activity"

Defendants have not made a strong showing with respect to the first *Credit Suisse* factor. Nor have they demonstrated why the *Credit Suisse* analysis applies in this case.

Credit Suisse dealt with the intersection of securities law and antitrust law. *Credit Suisse*, 551 at 276. While the Supreme Court suggested that the case shared some similarities with other antitrust cases, it emphasized that the securities context – or, at a minimum, the facts of *Credit Suisse* – presented a variety of "factors . . . [that] make mistakes unusually likely" and "the securities-related costs of mistakes unusually high." *Id.* at 282. These concerns led the Court to conclude:

> *[W]here conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden*; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, *to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market.*

Id. (italics added).

The facts of this case do not place it within the *Credit Suisse* rubric.

Defendants fail to cite any case applying *Credit Suisse* outside of the securities context. At least two courts, however, have declined to broadly apply *Credit Suisse* in cases that did not arise under the U.S. securities laws. *See, e.g., Churchill Downs, Inc. v. Thoroughbred Horsemen's Group*, 605 F. Supp. 2d 870, 881 (W.D. Ky. 2009) ("*Churchill Downs*") (addressing Interstate Horseracing Act, 15 U.S.C. §3001-07) ("Because *Credit Suisse* dealt with a hedge fund

and securities laws, it is not directly applicable here."); *Energy Marketing Services, Inc. v. Columbia Gas Transmission Corp.*, 639 F. Supp. 2d 643 (D. W.Va. 2009) ("*EMS*") (addressing Federal Energy Regulatory Commission consent decree approving long term energy contracts) ("The Court makes no finding as to the scope of *Credit Suisse*, other than to say that the facts of this case do not place it under *Credit Suisse*.")

2. There Is No "Regulatory Authority To Supervise The Activities In Question"

Assuming *Credit Suisse*'s potential applicability, Defendants also have failed to satisfy the second *Credit Suisse* factor – the existence of a regulatory agency with the authority "to supervise the activities alleged" in the Complaint.

In *Credit Suisse*, the Supreme Court looked to the role of the underwriters in the IPO process as well as to the alleged laddering and tying arrangements to ascertain "the existence of regulatory authority under the securities law to supervise the activities in question." *Credit Suisse,* 551 U.S. at 275, 276-77. The Court determined that "the law grants the SEC authority to supervise all of the activities here in question. Indeed, the SEC possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit and otherwise regulate virtually every aspect of the practices in which the underwriters engage." *Id* at 276. The Court also cited regulations that grant the SEC power to regulate "communications between underwriting participants and their customers, including those that occur during road shows" – the very anticompetitive conduct that was alleged in the complaint. *Id* at 277.

Defendants do not squarely address the question of whether regulators, in Japan or elsewhere, have authority to oversee the international passenger air market, to supervise the market for air passenger travel between the United States and Asia/Oceana, or to remedy the industry-wide collusion alleged here. Defendants appear to suggest that such authority rests with the domestic aviation laws of Japan, the country's aeronautic regulators, and its air service agreements with other nations. *See* Japan Regulatory Brief, p. 3. Unlike *Credit Suisse*, however, there is nothing in the Japanese Civil Aeronautics Act, the 1998 MOU, or the air service

agreements proffered with Defendants' motion that specifically "grants [Japanese regulators] authority to supervise all the activities here in question," or affords them "considerable power to forbid, permit, encourage, discourage, tolerate, limit or otherwise regulate virtually every aspect of the practices in which [Defendants] engage." *See Credit Suisse*, 551 U.S. at 276. None of these addresses illegal agreements, understandings or conspiracies among market competitors to set the prices of international air travel at supracompetitive levels or to share cost information.

Nor is the second factor of *Credit Suisse* satisfied by a mere showing that Defendants' air passenger tariffs were filed with or approved by Japanese regulators. The opinion in *Dahl v. Bain Capital Partners, LLC*, 589 F.Supp.2d 112 (D. Mass. 2008) ("*Dahl*") is instructive on this point. In *Dahl*, the court held that the second *Credit Suisse* factor was not satisfied because, although the SEC regulated leveraged buy-outs generally and regulated filings made in connection with leveraged buy-outs, the SEC did not regulate the specific behavior in question, which was private equity transactions in leveraged buyouts.

> [Defendants] assert that the many filings that a Target Company must make in conjunction with an LBO represents regulation by the SEC. This argument is unconvincing. *The SEC does not substantively regulate the PE Firms, it merely requires certain disclosures be filed as part of an LBO transaction. Requiring disclosures is not* nearly as substantial and invasive as the regulations practiced in [*Credit Suisse*]. Indeed, [*Credit Suisse*] was decided as it was because of the breadth of the SEC's jurisdiction over the activities in question. *Id. Therefore, seeing that the SEC only required certain disclosures here, and that it did not substantively regulate the behavior in question, the second factor is not met.*

Id. at 116-17 (emphasis added). The same principle applies here. Although the proffered regulations and agreements touch upon air passenger fairs and require disclosures in connection therewith, the regulations do not specifically or substantively regulate the collusive misconduct alleged in the Complaint.

Furthermore, the regulations and other materials upon which Defendants rely do not provide any means for those injured by Defendants' conduct to recover damages on their own behalf. In *Credit Suisse*, the Court emphasized the fact that implied repeal of the antitrust laws would not leave victims without a private remedy because "the [p]rivate individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages"

under the Securities Exchange Act. *Credit Suisse*, 551 U.S. at 277; (citing 15 U.S.C. §§ 78bb, 78u-4, 77k). The existence of a private remedy under the Securities and Exchange Act "contributes to the unusual lack of need for antitrust suits in the securities context." *EMS*, 639 F. Supp. 2d at 651. The absence of any remedy under the proffered regulations and agreements for the conduct alleged here – either public or private – indicates that the Japanese regulatory authorities lack supervisory authority over the conduct and that Japan's regulatory scheme would not be compromised by antitrust claims brought by and on behalf of affected U.S. travelers.

3. There Has Been No "Continuously Exercised Regulatory Authority"

The third *Credit Suisse* factor cannot be satisfied unless Defendants demonstrate that Japanese authorities "continuously exercise their authority" to stem the collusive price-fixing behavior alleged in the Complaint. Defendants do not present any argument to show that this factor is satisfied here.

Moreover, as detailed above, Defendants also have not put forward any fact that would support an argument that Japanese regulatory authorities have "continuously exercised [their] legal authority to regulate conduct of the general kind now at issue." *Credit Suisse*, 551 U.S. at 277. In this regard, the present case is distinguishable from both *Credit Suisse* and *In re Short Sale Antitrust Litig.*, 527 F. Supp. 2d 253, 259 (S.D.N.Y. 2007), where the SEC exercised legal authority over precisely the same conduct at issue in those cases.

The holding in *Pennsylvania Avenue Funds v. Borey*, 569 F. Supp. 2d 1126, 1130-31 (W.D. Wash. 2008) ("*Borey*") further demonstrates why Defendants cannot show an implied repeal of the antitrust laws under the third *Credit Suisse* factor. In *Borey*, all of the involved parties conceded that the relevant regulatory agency had "sweeping power to regulate disclosure of bidding agreements like the one" at issue in that case. *Id.* Despite this concession, the court found no party:

> put forth a compelling argument that the [agency] has authority to prevent bidders like [those involved in the case] from joining forces. If the [agency's] power is limited to requiring disclosure, then the agency's exercise of that power does not

> conflict with antitrust law, under which disclosure is neither a remedy for anti-competitive conduct nor a defense to the imposition of liability.

Id. The court held that the third *Credit Suisse* factor was not satisfied because there were no provisions addressing defendants' precise conduct.

The court in *Borey* further distinguished the case before it from *Credit Suisse*, noting the absence of:

> regulatory authority or enforcement over efforts by competing bidders to join forces in a contest for corporate control. More importantly, however, Defendants have not convinced the court either that the [agency] possesses authority over the anticompetitive conduct that Plaintiff alleges, or that it exercised that authority.

Id. In sum, when the substantive behavior at issue is not regulated, as is the case here, there can be no implied repeal of the antitrust laws and *Credit Suisse* does not apply. *Dahl*, 589 F. Supp. 2d at 117, n.4 (*citing Borey*, 569 F. Supp. 2d at 1130). *See also Eagletech Comm'ns v. Citigroup*, Inc., No. 07-60668-CIV, 2008 U.S. Dist. LEXIS 49432 at *32 n. 12 (S.D.Fla. June 27, 2008) (finding that *Credit Suisse* would not apply to conduct alleged in the complaint, even though short sales – which are regulated by the SEC – were at the base of that conduct because the conduct involved something more than the typical short sale.)

4. The Proffered Laws, Regulations And Agreements Do Not Conflict With Plaintiffs' Antitrust Claims

Defendants' primary argument under *Credit Suisse* is directed to the fourth *Credit Suisse* factor – whether Defendants are at risk of having to meet conflicting guidance, requirements, duties, privileges or standards of conduct, should they be required to adhere to the laws and aeronautic regulations of Japan, and U.S. antitrust law. They suggest they are "caught between potentially competing expectations of foreign [presumably, Japanese] regulation . . . and U.S. antitrust law enforced by Federal courts." Japan Regulatory Brief, p. 15.

Defendants' "conflict" argument is unavailing, however. The question with respect to the fourth element of the *Credit Suisse* test is whether the implicated regulatory scheme conflicts with

the U.S. antitrust laws. There is no conflict here; in fact, the two schemes are designed to, and do, complement each other.

Each of the Court's four considerations in *Credit Suisse* – (1) the inability to separate the permissible from the impermissible if both areas of law were to apply; (2) the need for expertise in the area of applicable regulatory laws; (3) the overlapping evidence from which reasonable, but contradictory, inferences may be drawn; and (4) the risk of inconsistent court results – favor Plaintiffs. *Credit Suisse*, 551 U.S. at 279-80.

First, the laws, regulations and air service agreements upon which Defendants rely do not pose any difficulty in separating the permissible from the impermissible, were both to apply. Indeed, a simple review of the materials supplied with Defendants' motion show that these laws and agreements were prepared with the expressed intent of complementing, and furthering free market competition, a core principle of the U.S. antitrust laws. For example, the 1998 MOU, which serves as the foundational document "ensuring the implementation of the bilateral Civil Air Transport Agreement . . . in a manner appropriate to the Japan-U.S. aviation relationship[,]" underscores this point. Part VII of the 1998 MOU concerns Pricing and Distribution: it provides that the airlines of each party are free to market their air transportation services directly to consumers, and allows for competitive fare or rate pricing. (RJN, Ex. W, at p. 21). Part X of the 1998 MOU sets forth the procedures that apply to all services provided for under the MOU: it expressly provides that "***[n]othing in this 1998 MOU shall be construed to limit the rights of either Party to enforce its domestic competition laws . . . against any airline*** operating services under this 1998 MOU . . . ." *Id*, Ex. W, at p. 26 (bold italics supplied). Furthermore, the Air Transport Agreement between the American Institute in Taiwan and the Taiwan Economic & Cultural Office (RJN Exh. BB) and the Air Transport Agreements Between the Government of the United States of America and the Government of the Kingdom of Thailand (*see* RJN Exh. AA, Art. 12 (Pricing)) provide for the price of air transportation to be set by free market competition.

Thus, contrary to Defendants' assertion, there is no risk that Defendants will be caught between potentially competing foreign regulation and U.S. antitrust law. As shown above, the 1998 MOU and each airline service agreements allow for enforcement of antitrust violations. There is no conflict here.

Second, although Defendants' collusive pricing schemes are extensive, this case does not require unusual or special expertise beyond the experience required in any antitrust case.

Third, there are no contradictory inferences drawn from overlapping evidence. Because the 1998 MOU and the airline transport agreements require competitive pricing arrangements, any evidence of collusive or anticompetitive behavior by Defendants presents similar inferences under these agreements, the Japanese regulatory scheme and U.S. antitrust laws.

Fourth, there hardly could be inconsistent court rulings. This action is being prosecuted in a single court pursuant to transfer by the Judicial Panel for Multi-District Litigation. The case will proceed through pre-trial proceedings and to a trial in one court, before one judge or jury. There is no risk of competing lawsuits or inconsistent court rulings.

In sum, this case presents no conflict and certainly does not involve "clear repugnancy" between the laws of Japan, the Japanese regulatory scheme and the airline service agreements, on the one hand, and U.S. antitrust law, on the other, required for preclusion. *Credit Suisse*, 551 U.S. at 275. Even if Defendants could show *incompatibility* – which they have not – they would still miss the mark:

> *Mere incompatibility, as opposed to clear repugnancy, seems insufficient to find implied immunity.* Immunity is only appropriate where the legislature's subsequent legislation would be so contradictory to antitrust legislation, or where attempting to follow both sets of legislation would be so confusing, that the legislature must have intended to repeal the antitrust laws in certain circumstances despite having failed to explicitly say so . . . . The Court finds no such clear repugnancy between the IHA and the antitrust laws here.

Churchill Downs, 605 F. Supp. 2d at 886; *citing Credit Suisse*, 551 U.S. at 275. (italics added). S*ee also Axcan Scandipharm,Inc. v. Ethex Cor*p., 585 F. Supp. 2d 1067, 1076 (D. Minn. 2007) (no *Credit Suisse* preclusion because there was no "serious conflict" between the Lanham Act claim and FDA regulations); *Helicopter Transport Services, Inc. v. Erickson Air-Crane, Inc.*,

2008 U.S. Dist. LEXIS 3466 at *14 (D. Or. Jan. 14, 2008) (under *Credit Suisse*, "implicit preemption applies only if there is a 'plain repugnancy' between antitrust claims and federal securities law . . . .").

IV. CONCLUSION

Defendants' argument that the state action doctrine immunizes them from antitrust liability fails because: (1) no court has ever extended the state action doctrine to private parties' conduct authorized and supervised by a *foreign* government; and (2) even if the Court is inclined to extend the doctrine to such conduct, Defendants' conduct does not satisfy the doctrine established by the Supreme Court in *Midcal*, 445 U.S. at 105.

Defendants' argument that Plaintiffs' claims are barred because the Japanese regulatory regime impliedly preempts the Sherman Act also fails because: (1) the Supreme Court has held that repeal of the antitrust laws is to be implied rarely and to the minimum extent necessary (*Credit Suisse*, 551 U.S. at 272); (2) Defendants cite no law extending the doctrine to conflicts between U.S. and *foreign* law; and (3) even if the Court is willing to take that leap, Defendants fail to satisfy the Supreme Court's four-factor test because there is no clear repugnancy between the Japanese regulatory scheme and U.S. antitrust law.

Accordingly, the Court should deny Defendants' motion to dismiss.

Dated: January 22, 2010

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